

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte STEVEN B. DUNN and
TOR H. PETERSON

Appeal 2007-0870
Reissue Application 09/902,904¹
Patent 6,038,784
Technology Center 3700

Decided: June 20, 2007

Before CAROL A. SPIEGEL, SALLY GARDNER LANE and JAMES T. MOORE, *Administrative Patent Judges*.

SPIEGEL, *Administrative Patent Judge*.

DECISION ON APPEAL

A. *Statement of the case*

This is an *ex parte* appeal under 35 U.S.C. § 134(a) (2002) from rejected claims 2, 4-7, and 9-34. Claims 35-49, the only other pending

¹ The Reissue Application on appeal was filed on 11 July 2001. The Reissue Application seeks to reissue US Patent 6,038,784, issued 21 March 2000, based on Application 09/113,868, filed 10 July 1998. The real party-in-interest is said to be Munchkin, Inc.

claims in the Reissue Application on appeal, have been withdrawn from consideration as being drawn to a non-elected invention. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

Appellants broadly claim an apparatus for drying and storing articles, such as baby bottles, comprising a plurality of pegs mounted on a tray so as to be movable between a first storage position and a second operative position. The pegs may be mounted in such a manner that standing water does not collect at the point in the tray where the pegs are mounted, thereby minimizing potential for mold and bacterial growth.

Claims 2, 4, 9, 11, 18, 19, 22, and 32 are independent claims and read as follows:

2. An apparatus for storing an article,
comprising:

a tray having a bottom face that is adapted to be supported by an underlying surface such as a counter-top, and an upper face; and

a plurality of pegs extending outwardly from said upper face, each of said pegs being sized and arranged so as to be able to support an article, and

wherein each of said pegs are [sic] permanently mounted to said tray in such a manner as to be movable between a first storage position, wherein said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus, and a second, operative position, wherein said peg is positioned so as to extend outwardly from said upper surface, so as to enable said peg to support an article, wherein said apparatus can conveniently be folded for packaging and storage purposes, and wherein said

pegs are mounted to said tray in such a manner that no standing water may collect at a point where a peg is mounted, thereby minimizing potential for mold and bacterial growth.

4. An apparatus for storing an article, comprising:

a tray having a bottom face that is adapted to be supported by an underlying surface and an upper face;

a plurality of pegs extending outwardly from said upper face, each of said pegs being sized and arranged so as to be able to support an article, and wherein

each of said pegs are [sic] permanently mounted to said tray in such a manner as to be movable between a first storage position, wherein said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus, and a second, operative position, wherein said peg is positioned so as to extend outwardly from said upper surface, so as to enable said peg to support an article, wherein said apparatus can conveniently be folded for packaging and storage purposed, and wherein said pegs are mounted to said tray in such a manner as to be movable only about a single axis of rotation and wherein said apparatus further comprises means for imparting lateral stability to said pegs, further deterring any motion other than about said single axis of rotation.

9. An apparatus for storing an article, comprising:

a tray having a bottom face that is adapted to be supported by an underlying surface, and an upper face; and

a plurality of pegs extending outwardly from said upper face, each of said pegs being sized and arranged so as to be able to support an article,

disk holding means, connected to said upper face of said tray, for holding baby bottle disks in a location that is isolated from areas of said tray in which liquid may collect; and

wherein each of said pegs are [sic] permanently mounted to said tray in such a manner as to be movable between a first storage position, wherein said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus, and a second, operative position, wherein said peg is positioned so as to extend outwardly from said upper surface, so as to enable said peg to support an article, wherein said apparatus can conveniently be folded for packaging and storage purposes.

11. An apparatus for storing an article, comprising:

a tray having a bottom face that is adapted to be supported by an underlying surface, and an upper face; and

a plurality of pegs extending outwardly from said upper face, each of said pegs being sized and arranged so as to be able to support an article,

a plurality of ring support members that are constructed and arranged to support a portion of a baby bottle;

and wherein each of said pegs are [sic] permanently mounted to said tray in such a manner as to be movable between a first storage position, wherein said entire peg is positioned adjacent to

said upper face for storage and packaging of said apparatus, and a second, operative position, wherein said peg is positioned to extend outwardly from said upper face, so as to enable said peg to support an article, wherein said apparatus can conveniently be folded for packaging and storage purposes.

18. An apparatus for storing an article, comprising:

a tray having a bottom face that is adapted to be supported by an underlying surface, and an upper face; and

a plurality of pegs extending outwardly from said upper face, each of said pegs being sized and arranged so as to be able to support an article,

a cutout area on a side of said apparatus for facilitating lifting of said apparatus by a user; and wherein

each of said pegs are [sic] permanently mounted to said tray in such a manner as to be movable between a first storage position, wherein said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus, and a second, operative position, wherein said peg is positioned so as to extend outwardly from said upper surface, so as to enable said peg to support an article, wherein said apparatus can conveniently be folded for packaging and storage purposes.

19. An apparatus for drying and storing an article, comprising:

a tray having a bottom face that is adapted to be supported by an underlying surface and an upper face;

bottle support means for supporting a baby bottle; and

disk holding means, connected to said upper face of said tray, for holding baby bottle disks in a location that is isolated from areas of said tray in which liquid may collect, whereby

baby bottle disks are and [sic] stored in a safe manner at a location that is convenient to a location at which baby bottles are being dried.

22. An apparatus for supporting baby bottles for drying, comprising

a tray having a bottom portion that is adapted to be supported by an underlying surface and an upper portion;

a plurality of pegs extending outwardly from said upper portion, each of said pegs being sized and arranged so as to be able to support a baby bottle;

mounting means for mounting said pegs to said tray so that said pegs are movable while mounted to said tray between a first storage position, wherein said entire peg is positioned adjacent to said upper portion for storage and packaging of said apparatus, and a second, operative position, wherein said peg is positioned so as to extend outwardly from said upper portion, so as to enable said peg to support an article, wherein said apparatus can conveniently be folded for packaging and storage purposes; and

frictional means connected to said pegs for frictionally engaging said upper portion of said tray when said pegs are moved between said first

storage position and said second operative position.

32. An apparatus for supporting baby bottles for drying, comprising:

a tray having a bottom that is adapted to be supported by an underlying surface and an upper face, said upper face of said tray being oriented with respect to said bottom so that one end of said upper face is lower than an opposite end so that water will run toward said one end during use; and

a plurality of pegs extending outwardly from said upper face, each of said pegs being sized and arranged so as to be able to support an article, said pegs being positioned away from the edges of said upper face, whereby any water falling off of an article that is supported by any of said pegs will fall within said tray, and wherein

each of said pegs are [sic] permanently mounted to said tray in such a manner as to be movable between a first storage position, wherein said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus, and a second, operative position, wherein said peg is positioned to extend outwardly from said upper surface, so as to enable said peg to support an article, wherein said apparatus can conveniently be folded for packaging and storage purposes.

The Examiner rejected various claims on appeal under 35 U.S.C. §§ 112, second paragraph (indefinite), 102(b), and 103(a). The Examiner also provisionally rejected certain appealed claims under nonstatutory obviousness-type double patenting over co-pending Application 09/902,965.

The following prior art² was relied upon by the Examiner:

Slipp	GB 160,098	17 Mar. 1921
Son	US 2,472,028	31 May 1949
Fox	US 2,979,900	18 Apr. 1961
Folini	CH 685,919 A5	15 Nov. 1995
Chang	US 5,492,237	20 Feb. 1996

Slipp, Son, Fox, Folini, and Chang qualify as prior art under 35 U.S.C. § 102(b).

In deciding this appeal, we have considered *only* the following: (a) the Reissue Specification, including original claims, (b) the Non-Final Rejection entered 22 November 2005, (c) the Interview Summary mailed 16 May 2006, (d) the Appeal Brief ("Br.") filed 23 May 2006, (e) the Examiner's Answer ("Answer") mailed 29 June 2006, (f) the PTO bibliographic data sheet for the Reissue Application on appeal, (g) US Patent 6,038,784, which is the patent sought to be reissued, (h) Slipp, (i) Son, (j) Fox, (k) Folini, (l) Chang, and (m) claims 2, 4-7, and 9-34 on appeal.

The rejections under review in this appeal are as follows:³

(1) Claim 2 stands rejected under 35 U.S.C. § 112, second paragraph, as indefinite in reciting "such as."

(2) Claims 2, 4-7, 9, 22-26, and 29 stand rejected under 35 U.S.C. § 102(b) as anticipated by Slipp.

² The reader should know that no references to *et al.* are made in this opinion.

³ The Examiner has withdrawn the following rejections, i.e., the rejection of (i) claims 4-7, 15-17, 22, 24-26, and 29 under § 112, first paragraph (lack of written description), (ii) claims 4-7, 15-17, 22, 24-26, and 29 under § 112, second paragraph (indefiniteness), and (iii) claim 21 under § 102(b) as anticipated by Son (Answer, 12).

(3) Claims 19-20 stand rejected under 35 U.S.C. § 102(b) as anticipated by Son.

(4) Claim 10 stands rejected under 35 U.S.C. § 103(a) as obvious over Slipp in view of Son.

(5) Claim 11 stands rejected under 35 U.S.C. § 103(a) as obvious over Slipp in view of Folini.

(6) Claims 12-17, and 27-28 stand rejected under 35 U.S.C. § 103(a) as obvious over Slipp in view of Folini in further view of Chang.

(7) Claims 18, 21, and 30-34 stand rejected under 35 U.S.C. § 103(a) as obvious over Slipp in view of Fox.⁴

(8) Claims 2, 4-7, 9, 11, 18-19, and 32-34 stand provisionally rejected on the ground of nonstatutory obviousness-type double patenting over claims 5-15 of copending Application 09/902,965.

We affirm.

B. Indefiniteness

"The definiteness inquiry focuses on whether those skilled in the art would understand the scope of the claim when the claim is read in light of the rest of the specification." *Union Pacific Resources Co. v. Chesapeake Energy Corp.*, 236 F.3d 684, 692, 57 USPQ2d 1293, 1297 (Fed. Cir. 2001) citing *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576, 1 USPQ2d 1081, 1088 (Fed. Cir. 1983).

⁴ The addition of claim 21 to the Non-Final Rejection entered 22 November 2005 of claims 18 and 30-34 under § 103(a) over Slipp in view of Fox was made of record in the Interview Summary mailed 16 May 2006.

1. *Is claim 2 indefinite under § 112, second paragraph?*

Claim 2 recites an apparatus comprising, in relevant part, "a tray having a bottom face that is adapted to be supported by an underlying surface such as a counter-top. . .". The issue is whether use of exemplary claim language ("such as") renders claim 2 indefinite under 35 U.S.C. § 112, paragraph 2.

Appellants' Specification describes a tray having a bottom face that is adapted to be supported by an underlying surface such as a counter-top (col. 2, ll. 1-3, and 56-58). Descriptions of examples or preferences, e.g., a counter-top as a preferred underlying surface, are properly set forth in the Specification rather than in the claims because stating examples or preferences in the claims may lead to confusion over the intended scope of the claim. Here, the phrase "such as" in claim 2 is indefinite because it is unclear from Appellants' Specification whether the tray bottom encompasses is adapted to be supported by both (a) a flat working surface, e.g., in the case of a counter-top, or (b) a non-flat working surface, e.g., a ridged/channeled drain board or a wire basket drain rack. A tray adapted to be supported on a non-flat underlying surface might well have a complementary ridged bottom surface to control undesirable tray movement on the underlying surface. This claim language is analogous to the "material such as a rock wool or asbestos" language that was found to be indefinite in *Ex parte Hall*, 83 USPQ 38, 39 (Bd. App. 1949) ("it is not clear whether the material is actually rock wool or asbestos or some other material which for some unexplained reason in the claim is like one or the other of these materials."). Thus, it is unclear whether "such as" is intended to more narrowly define the

underlying surface and, thereby, the bottom face of the tray recited in claim 2.

Accordingly, on the record before us, we sustain the Examiner's rejection of claim 2 under 35 U.S.C. § 112, second paragraph, as indefinite.

We recognize the inconsistency implicit in our decision to sustain the rejection of claim 2 under 35 U.S.C. § 112, second paragraph, as being indefinite with an analysis of whether claim 2 is anticipated under 35 U.S.C. § 102(b) or obvious under 35 U.S.C. § 103(a). Normally, when substantial confusion exists as to the interpretation of a claim and no reasonably definite meaning can be ascribed to the terms in a claim, a determination as to unpatentability based on anticipation or obvious is not made. *In re Steele*, 305 F.2d 859, 862, 134 USPQ 292, 295 (CCPA 1962); *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970). However, in this instance, we consider it to be desirable to avoid the inefficiency of piecemeal Appellate review. *Ex parte Ionescu*, 222 USPQ 537, 540 (Bd. App. 1984). For purposes of our patentability analysis, we interpret Appellants' claim 2 as requiring "a tray having a bottom face that is adapted to be supported by an underlying surface" because Appellants' specification does not limit the underlying surface to any particular surface (see e.g., col. 2, ll. 1-3, and 56-58). We also note that this interpretation is not inconsistent with Appellants' assertion that a counter-top is not part of the claimed combination per se (Br., 11).

C. Anticipation

To anticipate a claim, a prior art reference must, either expressly or inherently, disclose each and every limitation in the claim. *Verdegaal Bros.*

v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir.), *cert. denied*, 484 U.S. 827 (1987); *RCA Corp. v. Applied Digital Data Sys., Inc.*, 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). "Absence from the reference of any claimed element negates anticipation." *Kloster Speedsteel AB v. Crucible, Inc.*, 793 F.2d 1565, 1571, 230 USPQ 81, 84 (Fed. Cir. 1986). The doctrine of inherency may not be used to establish anticipation unless a prior inherency can be established as a certainty. Probabilities or possibilities will not be sufficient to establish an inherent event. *Continental Can Co. U.S.A., Inc. v. Monsanto Co.*, 948 F.2d 1264, 1269, 20 USPQ2d 1746, 1749 (Fed. Cir. 1991).

During examination, "claims are to given their broadest reasonable interpretation consistent with the specification." *In re Sneed*, 710 F.2d 1544, 1548, 218 USPQ 385, 388 (Fed. Cir. 1983). "Generally, particular limitations or embodiments appearing in the specification will not be read into the claims." *Enron GmbH v. ITC*, 151 F.3d 1376, 1384, 47 USPQ2d 1725, 1731 (Fed. Cir. 1998) (quoting *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 867, 228 USPQ 90, 93 (Fed. Cir. 1985)). Furthermore, when the claim limitation in issue involves a means plus function clause, proper claim interpretation requires that such a claim "shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof." 35 U.S.C. § 112, sixth paragraph; *In re Bond*, 910 F.2d 831, 833, 15 USPQ2d 1566, 1568 (Fed. Cir. 1990) (referring to the specification to interpret the scope of a means plus function claim when reviewing a finding of anticipation); *In re Iwahashi*, 888 F.2d 1375, 1379 n.1, 12 USPQ2d 1908, 1912 n1. (Fed. Cir. 1989) ("Section 112 Para. 6

cannot be ignored when a claim is before the PTO any more than when it is before the courts in an issued patent."). Thus, in order to meet a means-plus-function limitation, the prior art "must (1) perform the identical function recited in the means limitation and (2) perform that function using the structure disclosed in the specification or an equivalent structure." *Carroll Touch, Inc. v. Electro Mechanical Sys., Inc.*, 15 F.3d 1573, 1578, 27 USPQ2d 1836, 1840 (Fed. Cir. 1993).

1. Are claims 2, 4-7, 9, 22-26, and 29 unpatentable under § 102(b) as anticipated by Slipp?

As a preliminary matter we note that Appellants have grouped claims 5-7, and claims 23-26 together with independent claims 4, and 22, respectively, upon which they directly depend. Appellants have not separately argued the patentability of claims 5-7 or 23-26. Therefore, the patentability of claims 5-7, and 23-26 stands or falls with the patentability of claims 4 and 22, respectively. 37 CFR § 41.37(c)(1)(v).

Claim 29 stands on a different footing because it depends from claim 27 which depends from claim 22, and, therefore, incorporates all the limitations of both claims 22 and 27. 35 U.S.C. § 112, fourth paragraph. Since the Examiner does not contend that claim 27 is anticipated by Slipp, it follows that the Examiner has not shown that claim 29, which incorporates the limitations of claim 27, is anticipated by Slipp. We, therefore, reverse the rejection of claim 29 under 35 U.S.C. § 102(b) as anticipated by Slipp.

a. Slipp

Slipp describes a collapsible drying rack (p. 1, ll. 10-11) comprising

(i) a tray **a** and **b** having a bottom face adapted to be supported by an underlying surface convenient for its use, e.g., a table, and an upper face (p. 1, ll. 73-78; p. 2, ll. 30-33; and, Figs. 1 and 3), and,

(ii) a plurality of pegs **c** and **d** extending outwardly (vertically) from said upper face, each peg being sized and arranged so as to be able to support an article (p. 1, ll. 79-80; p. 2, ll. 4-12; Figs. 1-4),

wherein each of the pegs are permanently mounted to the tray by horizontal bar **e** in such a manner as to be movable between a first folded storage position, wherein the entire peg is positioned adjacent to the upper face of the tray for storage and packaging of the drying rack apparatus (Fig. 4), and a second open operative position, wherein the peg is positioned to extend outwardly (vertically) from the upper surface, so as to enable the peg to support an article (Fig. 3) (p. 1, ll. 17-28 and 80-85; p. 2, ll. 4-12 and 21-26). Any water drainage from the articles being dried falls into the tray trough **a**, which can be subsequently emptied (p. 1, ll. 49-51; p. 2, ll. 12-16).

Slipp further describes horizontal bar **e**, to which the pegs **c** and **d** are mounted, as fitting snugly into the ends of the tray **a** and **b** such that the pegs pivot about a single axis **f** (p. 1, ll. 83-86; Figs. 3 and 4). According to Slipp, the pegs will remain in the vertical operative position until collapsed by hand (p. 1, ll. 28-35; p. 2, ll. 17-20).

b. the issue

The issue is whether Slipp discloses each and every limitation in claims 2, 4-7, 9, 22-26, and 29.

i. Appellants' position

Appellants contend that Slipp fails to disclose

(i) "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus" as recited in claims 2, 4, 9, and 22 (Br., 15, 18-19, 24, and 28);

(ii) "said pegs are mounted to said tray in such a manner that no standing water may collect at a point where a peg is mounted, thereby minimizing potential for mold and bacterial growth" as recited in claim 2 (Br., 15-16);

(iii) "means for imparting lateral stability to said pegs, further deterring any motion other than about said single axis of rotation" as recited in claim 4 (Br., 19-21);

(iv) "disk holding means, connected to said upper face of said tray, for holding baby bottle disks in a location that is isolated from areas of said tray in which liquid may collect" as recited in claim 9 (Br., 24-26); and,

(v) "frictional means connected to said pegs for frictionally engaging said upper portion of said tray when said pegs are moved between said first storage position and said second operative position" as recited in claim 22 (Br., 28-30).

ii. the Examiner's position

According to the Examiner,

(i) if a peg is next to the upper surface of the tray as shown in Slipp's folded drying rack, then the entire peg is adjacent to the upper surface and the intended use (for storage and packaging of the apparatus) is met by the collapsed folded drying rack of Slipp (Answer, 13-14);

(ii) the trough in Slipp's drying rack is designed to drain water away from the peg and, thus, minimizes potential for mold and bacterial growth because a drying area would remain dry (Answer, 14);

(iii) pivot means **f** in Slipp imparts lateral stability to the pegs **c** and **d** as shown in Figs. 1 and 2 because it prevents side to side motion and deters any motion other than that about a single axis of rotation (Answer, 15);

(iv) the top surfaces of tray **a** or horizontal bar **e** can reasonably and broadly be construed as the claimed disk holding means since each connect to an upper surface of the a tray and can be used to isolate baby bottle disks from areas of the tray where liquid may collect (Answer, 16); and,

(v) Slipp inherently anticipates the claimed frictional means because friction causes the pegs to remain in a second operative position until the hand of a user overcomes friction to collapse the pegs toward a first storage position and the claim language "for frictionally engaging" is a statement of intended use only (Answer, 17-18).

c. analysis

A determination that a claim is anticipated under 35 U.S.C. § 102(b) involves two analytical steps -- first, the claims must be given their broadest reasonable interpretation, where necessary; and, second, the construed claim must be compared to a prior art reference to determine if each and every claim limitation is found either expressly or inherently in that single prior art reference. *In re Crish*, 393 F.3d 1253, 1256, 73 USPQ2d 1364, 1366 (Fed. Cir. 2004).

(i) As to the limitation that "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus" recited in claims 2, 4, 9, and 22, we interpret "adjacent to" to mean "near to." Indeed, it appears that approximately half the length of pegs **18** are above the upper face **16** of tray **12** in the embodiment of the invention depicted in Fig. 2 of Appellants' Reissue Application. Therefore, a broad interpretation of "adjacent to" is not inconsistent with Fig. 2 of Appellants' Reissue Application. Thus, a peg that is entirely near to the upper surface of a tray when the peg is in its collapsed position for storage as described by Slipp (see Fig. 4) satisfies the claim limitation that "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus."

Based on the foregoing, we find the limitation that "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus" as recited in claims 2, 4, 9, and 22 is disclosed in Slipp.

(ii) As to the limitation that "said pegs are mounted to said tray in such a manner that no standing water may collect at a point where a peg is mounted, thereby minimizing potential for mold and bacterial growth" recited in claim 2, we find the claim language clear on its face. Claim 2 is open to any structural means of mounting the pegs to the tray to avoid standing water collecting at the point where the peg is mounted. The trough in Slipp is provided for the express purpose of draining water away from articles supported by the pegs mounted the horizontal bar above the trough (p. 1, ll. 49-51; p. 2, ll. 12-16; Fig. 3).

Appellants have not pointed to, and we do not find, any disclosure in their Reissue Application limiting the claimed invention to a specific

drainage structure, e.g., drainage holes in the sides of the trough which are below the peg mounting so that water flows out of the drainage holes before it can contact the peg mounting. Appellants simply argue that "if the trough [in Slipp] is not emptied by a user, standing water will collect in the trough and eventually reach the locations where the pegs are mounted" (Br., 16, bracketed text added). In other words, if the trough in Slipp is emptied by the user, standing water will not collect in the trough and will not reach the locations where the pegs are mounted. Appellants' argument is not on point.

Based on the foregoing, we find the limitation that "said pegs are mounted to said tray in such a manner that no standing water may collect at a point where a peg is mounted, thereby minimizing potential for mold and bacterial growth" recited in claim 2 is disclosed in Slipp.

(iii) Claim 4 requires a "means for imparting lateral stability to said pegs, further deterring any motion other than about said single axis of rotation." To meet a means-plus-function limitation, such as the means for imparting lateral stability limitation recited in claim 4, the prior art "must (1) perform the identical function recited in the means limitation and (2) perform that function using the structure disclosed in the specification or an equivalent structure." *Carroll Touch, Inc.*, 15 F.3d at 1578, 27 USPQ2d at 1840.

According to Appellants' Specification (col. 4, ll. 1-5),

[m]ounting structure **20**, by ganging adjacent pegs **18** and adjacent nipple support members **32** together by use of a common axis, thereby imparts lateral stability to the pegs **18** and the nipple support members **32**, further deterring any motion other than about the single axis of rotation **40**.

Figure 2 of Appellants' Specification depicts mounting structure **20** as a horizontal bar supporting pegs **18** and **32** such that the bar pivots about a single axis of rotation as a structure which corresponds to the claimed "means for imparting lateral stability. . ." as recited in claim 4.

Slipp discloses a mounting structure, i.e., horizontal bar **e**, supporting pegs **c** and **d** such that the bar **e** pivots about a single axis of rotation **f** and snugly fits into the sides **a** of the tray (Slipp, p. 1, ll. 83-86; Figs. 3 and 4). The snug fit of the horizontal bar **e** into the sides **a** of Slipp's tray deters any motion of the pegs other than about the single axis of rotation **f**, thereby performing the identical function recited in the means limitation function of claim 4 using the same or an equivalent structure as that disclosed in Appellants' Specification.

Appellants argue that the "means for imparting lateral stability to said pegs" should be construed to require the horizontal bar to extend over the width of the tray (as shown in Fig. 2 of Appellants' Application) rather than the length of the tray **9** (as shown in Fig. 2 of Slipp) (Br., 21). We decline to accept Appellants' claim construction. Instead, we broadly construe "lateral" as meaning "from side to side," irrespective of which way the tray is turned (lengthwise or widthwise).

Based on the foregoing, we find that the limitation of a "means for imparting lateral stability to said pegs, further deterring any motion other than about said single axis of rotation" recited in claim 4 is disclosed in Slipp.

(iv) The apparatus of claim 9 requires a "disk holding means, connected to said upper face of said tray, for holding baby bottle disks in a location that is isolated from areas of said tray in which liquid may collect."

According to Appellants' Specification (col. 4, ll. 39-53),

. . . apparatus **10** further includes a disk holding system **50** for holding baby bottle disks in a location that is isolated from areas of the tray **12** in which liquid may collect. . . . In the preferred embodiment, disc holding system **50** includes an upstanding boss member **52** that projects upwardly from the upper face **16** of tray **12** and has a plurality of disc receiving slots **54** defined therein. Boss member **52** and slots **54** are raised with respect to an underlying reservoir **56** that is located in the forward portion of tray **12**. As an added benefit, the reservoir space also acts as a finger space area for a user to get his/her fingers beneath the disc members for lifting them out after drying.

Thus, Appellants' Specification describes a boss member with slots raised with respect to an underlying reservoir as a structure which corresponds to the "disk holding means" recited in claim 9.

The Examiner concedes that the "disk holding system" described in Appellants' Specification excludes Slipp's disclosed pegs **c** or **d** from anticipating the claimed "disk holding means" (Answer, 16). However, the Examiner maintains that the top surfaces of Slipp's receptacle **a** or bars **e** are equivalent "disk holding means" because both are connected to an upper surface of the tray and can hold bottle disks in a location isolated from areas of the tray which may collect liquid (Answer, 16).

First, it reasonably appears that laying a wet, flat bottle disk on a flat surface would cause liquid to collect around and/or under the disk unless the flat surface had some sort of drainage means. Second, the corresponding "disk holding means" structure disclosed in Appellants' Specification or its equivalent is properly construed to include a drainage means, such as slots. Therefore, the Examiner has not established that the top surfaces of Slipp's receptacle **a** or bars **e** perform the identical function of the claimed "disk holding means" using the same or equivalent.

Based on the foregoing, we do not find that claim 9 is anticipated by Slipp.

(v) The apparatus of claim 22 recites, in relevant part, an apparatus comprising a "frictional means connected to said pegs for frictionally engaging said upper portion of said tray when said pegs are moved between said first storage position and said second operative position."

According to Appellants' Specification (col. 4, ll. 29-37),

[i]f it is desired to move the nipple support member **32** from the second, operative position shown in FIG. 1 to the first storage position shown in FIG. 2, a user will push the nipple support member **32** in the desired direction. Initially, this movement will be deterred by contact of the lower surface **44** and the leading edge of the lower surface with the upper surface **16** of tray **12**. Once the leading edge **45** has cleared the upper face, however, the nipple support member **32** will easily fold down into the position that is shown in FIG. 2.

Thus, Appellants' Specification describes a "frictional means connected to said pegs for frictionally engaging said upper portion of said tray when said

pegs are moved between a first storage position and a second operative position" as a rotating or sliding contact between two structures in the upper portion of the tray which resists relative motion until pushed by a user in a desired direction.

In Slipp, pivoting bars **e**, on which pegs **c** and **d** are mounted, are in contact with the tray **a** and **b** at an upper portion of the tray. The pegs **c** and **d** rotate between first storage and second operative positions when a user manually collapses the pegs, thereby frictionally engaging, i.e., rotating the bars **e** in contact with the upper portion of the tray at pivot axis **f**. [Slipp, p. 1, ll. 28-35 and 83-86; p. 2, ll. 17-20; Figs. 3 and 4.] Thus, Slipp describes performing the identical function recited in the means limitation function of claim 22 using the same or an equivalent structure as that disclosed in Appellants' Specification.

Based on the foregoing, we find the "frictional means connected to said pegs for frictionally engaging said upper portion of said tray when said pegs are moved between said first storage position and said second operative position" recited in claim 22 is disclosed by Slipp.

(vi) summary

Based on the foregoing, claims 2, 4-7, and 22-26 are anticipated by Slipp. The Examiner has failed to establish that claims 9 or 29 are anticipated by Slipp.

2. *Are claims 19 and 20 unpatentable under 35 U.S.C. § 102(b) as anticipated by Son?*

As a preliminary matter we note that Appellants have grouped claim 20 with claim 19, from which it depends, and have not separately argued the

patentability of claim 20. Therefore, the patentability of claim 20 stands or falls with the patentability of claim 19. 37 CFR § 41.37(c)(1)(v).

a. Son

Son discloses a sterilizing tray for a plurality of hypodermic needles (cannulae with hubs attached) regardless of the size or shape of their hubs (fitting at the end of the needle that can connect to a syringe, etc.) wherein the needles can either be in an upright position for sterilization or in a flat position for packaging (col. 1, ll. 1-7). The tray comprises a base **5** and sides **6**, a plurality of spaced fingers **15**, each with a resilient head **16** adapted to hold the hub of a needle, mounted on an arm **14** which can be raised or lowered to raise the needles supported thereon into an upright position or to position them flat in the tray, and a plurality of disposed tabs **19** with notches **20** adapted to support a needle cannula (pointed tubular medical component without the hub) (col. 2, ll. 1-2 and 16-36; Figs. 1 and 2).

b. the issue

The issue is whether Son discloses each and every limitation of claim 19.

i. Appellants' position

Appellants contend that Son fails to disclose a "bottle support means" and a "disk holding means" as recited in claim 19 (Br., 32-34). In particular, Appellants contend that the fingers of Son support hypodermic needles which "greatly differ in size, in shape and in their intended purpose from the 'baby bottles' that are positively set forth in independent claim 9" (Br., 33). Appellants further contend that a disk holding means requires an upstanding

boss member projecting up for the upper face of the tray and a plurality of disk receiving slots defined in the boss member (Br., 34).

ii. the Examiner's position

The Examiner contends that Son elements **14**, **19**, **20** or **16** are the claimed "bottle support means" and that Son elements **19** or **20** are the claimed "disk holding means" (Answer, 18).

c. analysis

According to Appellants' Specification (col. 3, ll. 3-5), "[e]ach of the pegs **18** is sized and arranged so as to be able to support an article, such as a baby bottle, after washing and rinsing" (Specification, col. 3, ll. 3-5). Thus, Appellants' Specification describes a peg as a "bottle support means." As noted above (§C.1.c.(iv)), Appellants' Specification describes a boss member with slots raised with respect to an underlying reservoir as a structure as corresponding to a "disk holding means."

Son discloses an equivalent "bottle supporting means," i.e., fingers **15** adapted to support hubs regardless of their size or shape. However, in order for Son to anticipate the subject matter of claim 19, Son's disclosed fingers **15** must be capable of supporting a baby bottle. The Examiner has not provided a sufficient basis for the finding that Son's fingers **15** necessarily have that capability. Probabilities or possibilities are insufficient to establish anticipation. *Continental Can Co.*, 948 F.2d at 1269, 20 USPQ2d at 1749. Similarly, assuming without deciding that the upwardly disposed tabs **19** with notches **20** therein are equivalent "disk holding means," the Examiner has not established that they can hold baby bottle disks as required by claim 19.

Based on the foregoing, we do not find claims 19 and 20 to be anticipated by Son. However, in view of the recent Supreme Court decision *KSR Int'l v Teleflex, Inc.*, 127 S.Ct. 1727, 82 USPQ2d 1385 (2007), the Examiner may wish to develop the record as to whether the subject matter of claims 19 and 20 would have been obvious to a skilled artisan over Son.

D. Obviousness

A claimed invention is not patentable if the subject matter of the claimed invention would have been obvious to a person having ordinary skill in the art. 35 U.S.C. § 103(a); *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d 1385 (2007); *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966).

Facts relevant to a determination of obviousness include (1) the scope and content of the prior art, (2) any differences between the claimed invention and the prior art, (3) the level of skill in the art and (4) any relevant objective evidence of obviousness or non-obviousness. *KSR*, 127 S. Ct. at 1731, 82 USPQ2d at 1389; *Graham*, 383 U.S. at 17-18.

A person having ordinary skill in the art uses known elements and process steps for their intended purpose. *Anderson's-Black Rock, Inc. v. Pavement Salvage Co.*, 396 U.S. 57 (1969) (radiant-heat burner used for its intended purpose in combination with a spreader and a tamper and screed); *Sakraida v. AG Pro, Inc.*, 425 U.S. 273, 282 (1976) (the involved patent simply arranges old elements with each performing the same function it had been known to perform); *Dunbar v. Myers*, 4 Otto (94 U.S.) 187, 195 (1876) (ordinary mechanics know how to use bolts, rivets and screws and it is obvious that any one knowing how to use such devices would know how to

arranged a deflecting plate at one side of a circular saw which had such a device properly arranged on the other side).

1. *Is claim 10 unpatentable under § 103(a) as obvious over Slipp in view of Son?*

Claim 10 specifically recites the "disk holding means" of independent claim 9 to comprise "an upstanding boss member that is raised from said upper face of said tray, and a plurality of disk-receiving slots defined in said boss member."

Dependent claims are nonobvious under § 103 if the independent claim on which they depend is non-obvious. *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1576 n.36, 1 USPQ2d 1593, 1604 n.36 (Fed. Cir. 1987). Such is the case here on the present record.

Based on the foregoing, we conclude that the Examiner has failed to establish that claim 10 is obvious over Slipp in view of Son. We decline to evaluate the obviousness of claims 9 and 10 over the disclosures of Slipp and/or Son in the first instance. However, in view of the recent holding in *KSR Int'l*, 127 S. Ct. 1727, 82 USPQ2d 1385 (2007), the Examiner may wish to develop the record as to whether the subject matter of claims 9 and 10 would have been obvious to a skilled artisan over the disclosures of Slipp and/or Son.

2. *Is claim 11 unpatentable under § 103(a) over Slipp in view of Folini?*

Independent claims 2 and 11 have been reproduced above and differ by a single limitation. Specifically, claim 2 requires the pegs to be mounted to the tray so that no standing water may collect at a point where the peg is

mounted, while claim 11 requires "a plurality of ring support members that are constructed and arranged to support a ring portion of a baby bottle."

a. Slipp and Folini

We have found that claim 2 is anticipated by Slipp (§ C.1.c.(i)).

Folini describes a storage device for storing a baby bottle set (p. 2, l. 2). Folini describes a device comprising a base tray **2**, with at least one rod **8** for holding a bottle **10**, a short rod **16** for holding a nipple/mouthpiece **18** and a plurality of cone-shaped rods **12**, **34** for holding a locking ring **14** (p. 4 "REFERENCE SYMBOLS" and Fig. 2).

The Examiner concluded that it would have been obvious to a skilled artisan to combine Slipp with the plurality of ring support members described by Folini for the purpose of providing supports for the ring portion of a baby bottle (Answer, 10).

b. Appellants' position

Appellants reiterates its argument applied to claim 2 that Slipp fails to disclose "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus" (Br., 40). Appellants contend that Folini fails to remedy this alleged deficiency in Slipp (Br., 41).

c. analysis

We reiterate our analysis of Slipp given above (§ C.1.c.(i)) and our finding that Slipp, in fact, discloses the claim limitation that "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus." Appellants do not contest the Examiner's conclusion that it would have been obvious to a skilled artisan to combine the plurality of ring

support members disclosed by Folini with the rack of Slipp for the purpose of providing support for the ring portion of the baby bottle (Answer, 10).

Accordingly, on the record before us, we sustain the Examiner's rejection of claim 11 under § 103(a) as obvious over Slipp and Folini.

3. *Are claims 12-17, 27, and 28 unpatentable under § 103 over Slipp in view of Folini, further in view of Chang?*

a. *claims 12-17*

Claim 12 further limits the apparatus of claim 11 by requiring "said ring support members to include a stop member for supporting a ring member above and out of contact from said upper face tray." Claim 13 further limits the apparatus of claim 11 by reciting that "said ring support members are mounted to said tray in such a manner as to be movable between a first storage position, wherein said entire ring support member is positioned adjacent to said upper face for storage and packaging of said apparatus, and a second, operative position, wherein said ring support member is positioned at a large angle with respect to said upper face." Claim 14 requires the apparatus of claim 13 to have "said ring support members . . . mounted to said tray in such a manner as to be movable only about a single axis of rotation." Claim 15 adds a "means for imparting lateral stability to said ring support members, further deterring any motion other than about said single axis of rotation" to the apparatus of claim 14. Claim 16 further defines the means for imparting lateral stability of claim 15 to one comprising "at least one axle joining adjacent ring support members together for a common, ganged movement about a common axis of rotation." Claim 17 adds a "location means for locking said axle in a

rotational position that corresponds to said second operative position" to the apparatus of claim 16.

i. Slipp, Folini and Chang

Slipp and Folini have been described above.

Chang discloses an expandable and retractable multiple article drying rack, e.g., for various components of a baby bottle assembly (col. 1, ll. 8-13). In one embodiment, Chang describes a rack comprising a plurality of rotatable connectors in its base assembly, including an annular stop element and a latch element contractable by application of inwardly directable force (col. 3, ll. 11-15; col. 3, l. 66 to col. 4, l. 34; Figs. 6 and 7).

The Examiner concluded that it would have been obvious to one skilled in the art to combine the teachings of Slipp and Folini with Chang's disclosure of "a stop member ring support mount for imparting lateral stability including locking means with or without a cam stop member at column 3 line 66 through column 4 line 34. . .for the purpose of providing a supporting an article" (Answer, 10).

ii. Appellants' position

Claims 12-17 depend, directly or indirectly, from claim 11. As to claims 12-17, Appellants reiterate their argument that the applied prior art fails to address the limitation that "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus" (Br., 42-45).

iii. analysis

We reiterate our analysis of Slipp given above (§ C.1.c.(i)) and our finding that Slipp, in fact, discloses the claim limitation that "said entire peg is positioned adjacent to said upper face for storage and packaging of said

apparatus." Appellants do not contest the Examiner's conclusion that it would have been obvious to one skilled in the art to combine the teachings of Slipp and Folini with Chang's disclosure of "a stop member ring support mount for imparting lateral stability including locking means with or without a cam stop member at column 3 line 66 through column 4 line 34. . .for the purpose of providing a supporting an article" (Answer, 10).

Accordingly, on the record before us, we sustain the Examiner's rejection of claims 12-17 under § 103(a) as obvious over Slipp, Folini and Chang.

b. claims 27 and 28

Claim 28 depends from claim 27 which depends from claim 26 which depends from claim 22. We have found claims 22 and 26 to be anticipated by Slipp under § 102(b). Claim 27 further requires the apparatus of claim 26 to comprise location means comprising a cam stop surface for locking said pegs in said second, operative position and claim 28 requires the cam stop surface to be elevated with respect to said upper portion of the tray.

i. Slipp, Folini and Chang

Slipp, Folini and Chang have been discussed above. The Examiner concluded that it would have been obvious to one skilled in the art to combine the teachings of Slipp with Chang's disclosure of "a stop member ring support mount for imparting lateral stability including locking means with or without a cam stop member at column 3 line 66 through column 4 line 34. . .for the purpose of providing a supporting an article" (Answer, 10).

ii. Appellants' position

Appellants argue that the prior art fails to address two limitations asserted to be lacking in Slipp, i.e., that "said entire peg is positioned adjacent to said upper portion for storage and packaging of said apparatus" and "frictional means connected to said pegs for frictionally engaging said upper portion of said tray when said pegs are moved between said first storage position and said second operative position" as recited in claim 22 (Br., 46-50).

iii. analysis

We reiterate our analysis of Slipp and our finding that Slipp discloses the two claim limitations of claim 22 that "said entire peg is positioned adjacent to said upper portion for storage and packaging of said apparatus" and "frictional means connected to said pegs for frictionally engaging said upper portion of said tray when said pegs are moved between said first storage position and said second operative position." Appellants do not contest the Examiner's conclusion that it would have been obvious to one skilled in the art to combine the teachings of Slipp with Chang's disclosure of "a stop member ring support mount for imparting lateral stability including locking means with or without a cam stop member at column 3 line 66 through column 4 line 34. . .for the purpose of providing a supporting an article" (Answer, 10).

Accordingly, on the record before us, we sustain the Examiner's rejection of claims 27 and 28 under § 103(a) as obvious over Slipp and Chang.

4. *Are claims 18, 21 and 30-34 unpatentable under § 103 over Slipp in view of Fox?*

a. *claims 18 and 21*

Independent claims 2 and 18 have been reproduced above and differ by a single limitation. Specifically, claim 2 requires the pegs to be mounted to the tray so that no standing water may collect at a point where the peg is mounted, while claim 18 requires "a cutout area on a side of said apparatus for facilitating lifting of said apparatus by a user."

i. *Slipp and Fox*

We have found that claim 2 is anticipated by Slipp (§ C.1.c.(i)).

Fox describes a bottle drying rack comprising a cutout area on a side defining draining areas and support feet (col. 3, ll. 36-51; Fig. 3).

The Examiner concluded that it would have been obvious to a skilled artisan to combine the teachings of Slipp with the cutout of Fox "for the purpose of providing a lifting an article" (Answer, 11).

ii. *Appellants' position*

Appellants argue that the prior art fails to address two limitations asserted to be lacking in Slipp, i.e., that "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus" and "frictional means connected to said pegs for frictionally engaging said upper portion of said tray when said pegs are moved between said first storage position and said second operative position" as recited in claim 22 (Br., 53-56). Appellants contend that Fox fails to remedy this alleged deficiency in Slipp (Br., 54-56).

iii. analysis

We reiterate our analysis of Slipp given above and our finding that Slipp, in fact, discloses the claim limitation that "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus." Appellants do not contest the Examiner's conclusion that it would have been obvious to combine the teachings of Slipp with the cutout of Fox "for the purpose of providing a lifting an article" (Answer, 11). Furthermore, Appellants have not separately argued the patentability of claim 21.

Accordingly, on the record before us, we sustain the Examiner's rejection of claims 18 and 21 under § 103(a) as obvious over Slipp and Fox.

b. claims 30 and 31

Claim 30 further limits the apparatus of claim 22 by adding "a cutout area on a side of said apparatus for facilitating lifting of said apparatus by a user," while claim 31 requires the "cutout area to be positioned beneath said one end of said upper portion."

The Examiner concluded that it would have been obvious to a skilled artisan to combine the teachings of Slipp with the cutout of Fox "for the purpose of providing a lifting an article" (Answer, 11).

i. Appellants' position

Appellants reiterates its argument applied to claim 22 that Slipp fails to disclose "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus" and "frictional means connected to said pegs for frictionally engaging said upper portion of said tray when said pegs are moved between said first storage position and said second operative

position" as recited in claim 22 (Br., 53-56). Appellants contend that Fox fails to remedy this alleged deficiency in Slipp (Br., 54-56).

ii. analysis

We reiterate our analysis of Slipp given above and our finding that Slipp, in fact, discloses the claim limitation that "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus" and "frictional means connected to said pegs for frictionally engaging said upper portion of said tray when said pegs are moved between said first storage position and said second operative position" as recited in claim 22. Appellants do not contest the Examiner's conclusion that it would have been obvious to combine the teachings of Slipp with the cutout of Fox "for the purpose of providing a lifting an article" (Answer, 11). Furthermore, Appellants have not separately argued the patentability of claim 31.

Accordingly, on the record before us, we sustain the Examiner's rejection of claims 30 and 31 under § 103(a) as obvious over Slipp and Fox.

c. claims 32-34

Independent claim 32 has been reproduced above. Claim 33 further limits the apparatus of claim 32 by adding "a cutout area on a side of said apparatus for facilitating lifting of said apparatus by a user," while claim 34 requires the "cutout area to be positioned beneath said one end of said upper portion."

The Examiner concluded that it would have been obvious to a skilled artisan to combine the teachings of Slipp with the cutout of Fox "for the purpose of providing a lifting an article" (Answer, 11).

i. Appellants' position

Appellants reiterates its argument that Slipp fails to disclose "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus" (Br., 58-59). Appellants contend that Fox fails to remedy this alleged deficiency in Slipp (Br., 59).

ii. analysis

We reiterate our analysis of Slipp given above and our finding that Slipp, in fact, discloses the claim limitation that "said entire peg is positioned adjacent to said upper face for storage and packaging of said apparatus." Appellants do not contest the Examiner's conclusion that it would have been obvious to combine the teachings of Slipp with the cutout of Fox "for the purpose of providing a lifting an article" (Answer, 11). Furthermore, Appellants have not separately argued the patentability of claims 33 and 34.

Accordingly, on the record before us, we sustain the Examiner's rejection of claims 32-34 under § 103(a) as obvious over Slipp and Fox.

E. Provisional obviousness-type double patenting

Claims 2, 4-7, 9, 11, 18-19, and 32-34 stand provisionally rejected on the ground of nonstatutory obviousness-type double patenting over claims 5-15 of copending Application 09/902,965 (Answer, 11).

Appellants do not contest this rejection.

Therefore, we summarily sustain the Examiner's provisional rejection of claims 2, 4-7, 9, 11, 18-19, and 32-34 on the ground of nonstatutory obviousness-type double patenting over claims 5-15 of copending application 09/902,965.

F. Summary

Claim 2 is unpatentable under 35 U.S.C. § 112, second paragraph, as indefinite. Claims 2, 4-7, 11-18, 21-28, and 30-34 are unpatentable under §§ 102(b) and/or 103(a). Claims 2, 4-7, 9, 11, 18-19, and 32-34 are unpatentable on the ground of nonstatutory obviousness-type double patenting over claims 5-15 of copending application 09/902,965. Claims 10, 20, and 29 depend on rejected base claims. Finally, in view of the recent Supreme Court decision in *KSR Int'l v. Teleflex, Inc.*, 127 S.Ct. 1727, 82 USPQ2d 1385 (2007), the Examiner may wish to develop the record as to whether the subject matter of claims 9, 10, 19, and 20 would have been obvious to one of ordinary skill in the art over the disclosure of Slipp and/or Son.

G. Order

Upon consideration of the record and for the reasons given, it is ORDERED that the Examiner's rejection of claim 2 under 35 U.S.C. § 112, second paragraph, as indefinite is AFFIRMED;

FURTHER ORDERED that the Examiner's rejection of claims 2, 4-7, and 22-26 under 35 U.S.C. § 102(b) as anticipated by Slipp is AFFIRMED;

FURTHER ORDERED that the Examiner's rejection of claims 9 and 29 under 35 U.S.C. § 102(b) as anticipated by Slipp is REVERSED;

FURTHER ORDERED that the Examiner's rejection of claims 19 and 20 under 35 U.S.C. § 102(b) as anticipated by Son is REVERSED;

FURTHER ORDERED that the Examiner's rejection of claim 10 under 35 U.S.C. § 103(a) as obvious over Slipp in view of Son is REVERSED;

FURTHER ORDERED that the Examiner's rejection of claim 11 under 35 U.S.C. § 103(a) as obvious over Slipp in view of Folini is AFFIRMED;

FURTHER ORDERED that the Examiner's rejection of claims 12-17 under 35 U.S.C. § 103(a) as obvious over Slipp in view of Folini further in view of Chang is AFFIRMED;

FURTHER ORDERED that the Examiner's rejection of claims 27 and 28 under 35 U.S.C. § 103(a) as obvious over Slipp in view of Chang is AFFIRMED;

FURTHER ORDERED that the Examiner's rejection of claims 18, 21, and 30-34 under 35 U.S.C. § 103(a) as obvious over Slipp in view of Fox is AFFIRMED;

FURTHER ORDERED that the Examiner's provisional rejection of claims 2, 4-7, 9, 11, 18-19, and 32-34 on the ground of nonstatutory obviousness-type double patenting over claims 5-15 of copending Application 09/902,965 is AFFIRMED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

Appeal 2007-0870
Reissue Application 09/902,904
Patent 6,038,784

lp

KNOBLE, YOSHIDA & DUNLEAVY
EIGHT PENN CENTER
SUITE 1350, 1628 JOHN F KENNEDY BLVD
PHILADELPHIA PA 19103